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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 533

STANDARD OIL COMPANY OF LOUISIANA,
Petitioner,

vs.

STATE OF TENNESSEE, Ex Rel. GEORGE F. McCANLESS, Commissioner, and ROY H. BEELER, Attorney General.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

Roy H. Beeler,
Attorney General of Tennessee,
William F. Barry,
Harry Phillips,
Assistant Attorneys General,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 533

STANDARD OIL COMPANY OF LOUISIANA,
Appellant,

vs.

STATE OF TENNESSEE, EX REL. GEORGE F. McCANLESS, COMMISSIONER, AND ROY H. BEELER, ATTORNEY GENERAL.

STATEMENT OF APPELLEE OPPOSING JURISDICTION ON GROUND OF WANT OF A SUBSTANTIAL FEDERAL QUESTION, AS AUTHORIZED BY SUPREME COURT RULE NUMBER TWELVE, PARAGRAPH THREE.

The appellee, the State of Tennessee, pursuant to the authorization contained in Supreme Court Rule Number Twelve, Paragraph Three, submits the following statement in opposition to the jurisdiction of the Court in this case.

I.

The appellant, Standard Oil Company of Louisiana, owns and operates a riverside terminal or storage plant at Memphis, Tennessee.

Large quantities of gasoline, tractor fuel, kerosene and other petroleum products are shipped by appellant from its

refinery at Baton Rouge, Louisiana, up the Mississippi River in barges to its riverside terminal or storage plant at Memphis, Tennessee, and there pumped into its storage tanks where it remains until later shipped out by railroad tank car or barge to points in Tennessee and to points in other States.

The State of Tennessee instituted suit against the Standard Oil Company of Louisiana in the Chancery Court of Davidson County, Tennessee, on December 8, 1939, to recover under the Inspection Fee Laws of Tennessee (Section 6809, *et seq.*, Code of Tennessee), "inspection fees" at the rate of 4/10 of a cent per gallon on all petroleum products which had been "imported into and/or stored in" Tennessee by appellant Standard Oil Company of Louisiana during the three-year period commencing October 1, 1936, and ending September 30, 1939. The Tennessee statutes under which the said inspection fees are claimed are contained in the Code of Tennessee of 1932, Section 6809, *et seq.* The particular Code sections material to this inquiry are as follows:

> "6817. *Inspection before sale.*—All benzol, gasoline, burning oil, distillate, fuel oil, gas oil, kerosene, naphtha, and/or other volatile substances, reflecting a gravity of sixteen degrees or above on the Baume scale, produced from petroleum, natural gas, oil shales or coal, by whatever trade name known and/or substitutes therefor sold or used and/or stored in this state, separately or in combination for any purpose whatever, by any user and/or storer, whether manufactured in this state or not, shall be inspected under the general supervision of the inspector at large, before being sold or used and/or stored in this state. Provided, that this section shall not be applicable to municipalities or other subordinate governmental bodies; and provided further, that inspection fees already accrued and unpaid by such municipalities and other subordinate governmental bodies shall not hereafter be collectible.

"6718. *Inspection by coal oil inspectors.*—It shall be the duty of the inspectors to examine and test, within this state, all such volatile substances before being sold or offered for sale or used and/or stored in this state."

"6821. *Fees of Inspectors.*—Each inspector who shall inspect any consignment of volatile substances described in the preceding sections, as provided in this article, shall charge the consignor or consignee thereof the sum of twenty cents for testing a barrel, or less quantity, and twenty cents additional for each barrel. Fifty gallons shall constitute a barrel. When the inspection is made of a tank containing more than fifty gallons, twenty cents shall be charged for each fifty gallons or fraction over."

No question arises as to the liability of appellant for inspection fees upon gasoline, tractor fuel, kerosene or other petroleum products which are sold within the State of Tennessee after being stored at said river terminal or storage plant. The question before the Court is appellant's liability for inspection fees upon gasoline, tractor fuel and kerosene which is brought by appellant in barges from its refinery at Baton Rouge, Louisiana, up the Mississippi River to Memphis, Tennessee, where it is there pumped from said barges into separate export tanks, which tanks are marked "for export" and where such products are actually shipped to other States by railroad tank car or barge within sixty days after being stored in the separate export tanks.

The State's claim for such inspection fees aggregated $317,366.06 during the period from October 1, 1936 to September 30, 1939. Of this amount there was $94,727.40 on 23,681,864 gallons of high test gasoline, referred to as "Esso," $135,503.24 on 33,875,811 gallons of regular gasoline, referred to as "Essolene," $46,496.95 on 11,624,237 gallons of tractor fuel and $40,638.41 on 10,159,603 gallons of kerosene.

In order to explain the decisions of the Chancery Court of Davidson County, Tennessee, and of the Supreme Court of Tennessee, it is necessary to point out that the State of Tennessee, in addition to its separate inspection fee statutes heretofore referred to also has a seven-cent excise tax upon the storage of gasoline. Tennessee by statute, however, under Section 1140, Code of 1932, exempts "export gasoline," or gasoline stored less than sixty days, from liability for the seven-cent gasoline tax. The statute in question provides:

> "1140. *Storage for export out of state, exception from act, conditions.*—Gasoline or distillate not previously the subject of an original sale in this state, stored in this state for export to points outside the state, shall not be included in the measure of the tax liability of any distributor or dealer; provided that such gasoline or distillate is stored in a separate tank marked "export tank";
>
> "Provided that a bond is executed by the distributor or dealer that in the opinion of the commissioner of finance and taxation adequately protects the state against loss of tax in case said gasoline or distillate is not subsequently exported outside the state;
>
> "Provided that gasoline or distillate stored for export longer than a period of sixty days must be included in the measure of the tax liability of the distributor or dealer so storing such gasoline or distillate."
>
> (Code Tenn. 1140, as amended Ch. 130, Acts 1933.)

It was the original basis of the State's suit that the above cited Code Section 1140 exempted appellant's gasoline stored less than sixty days from liability for the seven-cent gasoline tax, but that it did not exempt such gasoline or distillate from inspection fees when the same had come to rest and was stored in Tennessee for less than sixty days.

Of the inspection fees claimed, amounting to 4/10 of a cent per gallon, it is shown from the record and so found by the Chancellor, that the actual cost of inspection amounted to 1/25 of 4/10 of a cent per gallon, and that the remaining 24/25 of 4/10 of a cent per gallon constituted a privilege tax.

Following this line of reasoning the Chancery Court and also the Supreme Court of Tennessee construed Code Section 1140, which exempts "export gasoline" from the seven-cent gasoline tax, as also being an exemption of 24/25 of the inspection fees—since that constituted revenue over and above the actual cost of inspection.

The gist of the holding of the Supreme Court of Tennessee was that although all of the petroleum products in question had come to rest and were stored in Tennessee and were not in interstate commerce, there was still no tax liability upon the appellant upon any of the gasoline or tractor fuel stored, for the reason that the Court took the exemption (Code Section 1140 as amended) contained in the Tennessee gasoline taxing statute (seven-cent excise tax on storage) and construed it in *pari materia* with separate Code sections imposing inspection fees (Code Section 6809 *et seq.*) so as also to relieve appellant of 24/25 of the inspection fees on said gasoline and tractor fuel and to charge appellant only with 1/25 of the inspection fees, which amount the court found to be the actual cost of inspection; the theory being that the inspection fee statutes are 24/25 a revenue measure and the actual cost of inspection, 1/25, is a police measure.

The result is that although the court found that the gasoline and tractor fuel had come to rest and were stored in Tennessee, the court's construction of the State statute (Code Section 1140) was such as to relieve appellant from the payment of any revenue to the State.

Since kerosene was concededly not included under Code Section 1140, and since that statute had no application whatsoever to kerosene, it resulted that the court allowed the State a recovery of the inspection fees upon such kerosene stored by appellant.

Of all the gasoline involved and also the tractor fuel (which is classed as gasoline) the State was only allowed to recover 1/25 of the inspection fee, or $2,293.85, which represented the actual cost of inspection upon the gasoline and tractor fuel actually inspected. As to the kerosene involved in the suit, it was held by both Tennessee courts that it did not fall within the definition of gasoline or distillate and hence did not fall within the provisions of Code Section 1140, which exempted "export" gasoline and distillate stored less than sixty days from taxation. The court found that the 10,159,603 gallons of kerosene was liable for inspection fees and gave judgment in favor of the State for $40,250.74 due on said kerosene.

Thus, in the State's suit for $317,366.06 there was a total judgment of $42,844.60. Both the State of Tennessee and the Standard Oil Company appealed to the Supreme Court of Tennessee and that court affirmed the judgment of the lower court for the reasons set forth in the several opinions made exhibits to the Standard Oil Company's appeal.

It is contended by appellant before this Court that the petroleum products stored in the separate export tanks at Memphis, Tennessee, are rendered immune from Tennessee taxation by the Commerce Clause of the Constitution of the United States.

A detailed factual statement would be so lengthy as to transgress the rules of the court in this statement opposing jurisdiction, but from all of the evidence in the present case it is perfectly obvious that the petroleum products stored by appellant for a period of less than sixty days in

its tanks at Memphis, Tennessee, was not in interstate commerce.

The appellant unquestionably ships these petroleum products to its storage plant at Memphis and stores them there temporarily and intentionally for the use, benefit and profit of the Company. While such products are stored there within the sixty-day period they are still under the ownership and in the hands of the appellant and may be moved out and are moved out to other states in railroad tank cars or barges as the needs of the appellant in those states require. Such products are not held at Memphis awaiting available transportation facilities—such facilities are always available. The products in question are held there for the business purposes of the appellant, such as keeping each bulk plant filled to a desired capacity, or filling orders secured by their tank car salesmen.

The petroleum products involved herein are not handled so as to fall in that class of cases dealing with temporary stoppage of property in transit, to protect it from loss or injury, or to await available transportation facilities—such is not the case here. The petroleum products are intentionally stored and from said storage place appellant is enabled to make prompt delivery to points within the trade area and meet the competition of other companies shipping from Memphis to points in the same area.

It is nothing more than an interstate shipment from Baton Rouge, Louisiana, to Memphis, Tennessee, where it comes to rest, and a subsequent shipment from Memphis is begun any time within sixty days and in any quantity, and to any point at the will of the appellant.

In support of our above factual statement, the Supreme Court of Tennessee, in its opinion by Chief Justice Green (appellant's Exhibit "D"), pages 3 and 4, sets out as follows:

> "It is to be gathered from the proof that defendant's business was well organized and that by frequent re-

ports and investigations defendant kept well posted on the probable needs of its trade. The Essolene and kerosene distributed from Memphis by defendant was shipped in bulk to supply the needs of defendant's whole trade out of Memphis—intrastate and interstate. When the barges containing these products would reach Memphis, such portion of the Essolene and kerosene as defendant contemplated would be needed in other States was pumped into separate tanks, marked "Export Tanks," maintained as described in the Texas Company *v.* McCanless, Commissioner, supra. The remainder of the Essolene and kerosene, intended for defendant's Tennessee business, was pumped into other tanks. There was no separation of the Essolene and kerosene for the Tennessee trade from the Essolene and kerosene for the trade in other States until the barges reached Memphis.

"As above stated, the defendant maintained thirteen or fourteen storage tanks at Memphis. According to figures given in the deposition of its president, the capacity of the export tanks was 89,000 barrels, the capacity of the tanks for Tennessee business was 212,700 barrels. The capacity of the kerosene export tanks was 10,600 barrels, the capacity of the kerosene tanks for Tennessee business was 43,300 barrels. From these figures it appears that much the greater portion of defendant's products distributed from Memphis was applied to Tennessee business. As to the kerosene, less than one-fourth of that product stored at Memphis was shipped out of the State.

"Referring again to the testimony of defendant's president, it appears that the amount of Essolene and kerosene allotted to export tanks when the barges reached Memphis was based on estimates of its representatives and salesmen in the export territory. Orders for the Essolene and kerosene from this export territory were not received until after the allocation. The Essolene and the kerosene in the export tanks were placed therein to await orders, although it is fair to say that the defendant was able to estimate with much ac-

curacy the extent of these orders and quantities of these products necessary to supply the orders.

"The Essolene and kerosene stored in the export tanks might have been diverted by defendant to domestic needs but according to the proof there had been no such diversion."

On the facts contained in the record and from the above quoted finding of the Supreme Court of Tennessee, it is insisted by the appellee that the petroleum products in question had come to rest in Tennessee and had acquired a taxable situs. Further, that the petroleum products in question had been intentionally withdrawn from the flow of interstate commerce by the appellant and intentionally stored and held by appellant for its own business purposes and profit.

II.

Gasoline or petroleum products imported into Tennessee from refineries outside the State and stored in Tennessee for subsequent exportation to points in other States has come to rest and is not exempted from State taxation by the Commerce Clause of the Federal Constitution.

General Oil Co. v. *Crain*, 209 U. S. 211, 52 L. Ed. 754, 28 S. Ct. 475.

1. The case of *General Oil Company* v. *Crain* has been cited approvingly and followed repeatedly by the Supreme Court of the United States and the Supreme Court of Tennessee.

McGoldrick v. *Berwind-White Coal Mining Co.*, 84 L. Ed. 565, 309 U. S. 33;

Fed. Compress & W. Co. v. *McLean*, 291 U. S. 17, 78 L. Ed. 622, 54 S. Ct. 267;

Nashville C. & St. L. R. Co. v. *Wallace*, 288 U. S. 249, 77 L. Ed. 730, 53 S. Ct. 345;
Atlantic Coastline R. Co. v. *Standard Oil Co.*, 275 U. S. 257, 72 L. Ed. 270, 48 S. Ct. 107;
Susquehanna Coal Co. v. *South Amboy*, 228 U. S. 665, 57 L. Ed. 1015, 33 S. Ct. 712;
Bacon v. *Illinois*, 227 U. S. 504, 57 L. Ed. 615, 33 S. Ct. 299;
Sealed Power Corp v. *Stokes*, 174 *Tenn.* 493;
Spur Distributing Co. v. *Lindsey*, 166 Tenn. 424.

2. Where goods are shipped from one State to another and detained in such State, and after such period of detention are shipped to a third State, whether such goods are taxable in the second State depends upon whether the continuity of interstate transit is broken by such stoppage and detention. The intentional detention of such goods for the beneficial purposes of the owner breaks the continuity of the interstate shipment and renders the goods subject to taxation by the State where detained.

Gulf Refining Co. of La. v. *Phillips*, 11 F. (2d) 967 (Certiorari denied 273 U. S. 697, 71 L. Ed. 845, 47 S. Ct. 93).

3. The arresting of the movement of property in interstate commerce for the business purposes and profit of the owner thereof breaks the continuity of the interstate shipment and renders such property taxable in the State where its journey is stopped.

Atlantic Coastline R. Co. v. *Standard Oil Co.*, 275 U. S. 257, 72 L. Ed. 270, 48 S. Ct. 107, *supra;*
Susquehanna Coal Co. v. *South Amboy*, 228 U. S. 665, 57 L. Ed. 1015, 33 S. Ct. 712, *supra;*
Bacon v. *Illinois*, 227 U. S. 504, 57 L. Ed. 615, 33 S. Ct. 299, *supra;*

General Oil Co. v. *Crain*, 209 U. S. 211, 52 L. Ed. 754, 28 S. Ct. 475, *supra;*

Gulf Refining Co. of La. v. *Phillips*, 11 F. (2d) 967 (Certiorari denied 273 U. S. 697, 71 L. Ed. 845, 47 S. Ct. 93), *supra.*

4. While it is true that the continuity of interstate commerce is not broken by a temporary stoppage of property to protect same from loss or injury due to a natural cause, over which the owner has no control, cases so holding are readily distinguishable from cases where the stoppage occurs at the instance of the owner for business purposes and profits.

Hughes Bros. v. *Minnesota*, 272 U. S. 469, 71 L. Ed. 359, 47 S. Ct. 170;

Champlain Co. v. *Brattleboro*, 260 U. S. 366, 67 L. Ed. 309, 43 S. Ct. 146, 25 A. L. R. 1195;

Diamond Match Co. v. *Ontonagon*, 188 U. S. 82, 47 L. Ed. 394, 23 S. Ct. 266.

5. While it is true that the continuity of interstate commerce is not broken by temporary stoppage of property in a state other than the ultimate point of destination awaiting the availability of necessary transportation facilities, cases so holding are readily distinguishable from cases where the stoppage occurs at the instance of the owner for business purposes and profit.

State of Minnesota v. *Blasius*, 290 U. S. 1, 78 L. Ed. 131, 54 S. Ct. 34;

Carson Petroleum Co. v. *Vial*, 279 U. S. 95, 73 L. Ed. 626, 49 S. Ct. 292;

Texas & N. O. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111, 57 L. Ed. 442, 33 S. Ct. 229.

III.

In view of the foregoing decisions of this Court, this appeal should be dismissed, under the rule that where a Fed-

eral question sought to be made upon an appeal has been so explicitly decided by this Court as to foreclose further argument on the subject the appeal will be dismissed for want of a substantial Federal question.

Equitable Life Assurance Society of the United States v. *Brown*, 187 U. S. 308, 47 L. Ed. 190;
Leonard v. *Vicksburg S. & U. R. Co.*, 198 U. S. 416, 49 L. Ed. 1108;
Boston v. *Jackson*, 260 U. S. 309, 67 L. Ed. 274;
Tidal Oil Co. v. *Flanagan*, 263 U. S. 444, 68 L. Ed. 382.

Counsel for appellee regard the foregoing rule as peculiarly applicable in the instant case by reason of the decision of this Court in *General Oil Company* v. *Crain*, 209 U. S. 211, 52 L. Ed. 754, 28 S. Ct. 475, dealing precisely with the same Tennessee inspection fee statute under consideration here and dealing with a substantially similar method of storage and shipment of petroleum products from Memphis, Tennessee. We further regard *Atlantic Coastline R. Co.* v. *Standard Oil Co.*, 275 U. S. 257, 72 L. Ed. 270, 48 S. Ct. 107 as being directly in point.

Dated this 4th day of August, 1941.

ROY H. BEELER,
Attorney General of Tennessee;
WILLIAM F. BARRY,
HARRY PHILLIPS,
Assistant Attorneys General,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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STANDARD OIL COMPANY OF LOUISIANA,
Appellant,

vs.

STATE OF TENNESSEE, *Ex* Rel. GEORGE F. McCANLESS, Commissioner, and ROY H. BEELER, Attorney General.

MOTION BY APPELLEE TO DISMISS APPEAL FILED PURSUANT TO AUTHORIZATION CONTAINED IN SUPREME COURT RULE NUMBER TWELVE, PARAGRAPH THREE.

The appellee, the State of Tennessee, would show to this Court that the Federal questions sought to be made upon this appeal have been so explicitly decided in numerous decisions of this Court adversely to appellant's contention as to foreclose further argument on the subject. The appellee therefore moves the Court to dismiss this appeal for the want of a substantial Federal question.

Dated this 4th day of August, 1941.

ROY H. BEELER,
Attorney General of Tennessee;
WILLIAM F. BARRY,
HARRY PHILLIPS,
Assistant Attorneys General,
Counsel for Appellee.